DOCUMENT RESUME

ED 273 204 HE 019 618

AUTHOR Barr, Margaret J.
TITLE Legal Liability: When Is the Union Responsible?
PUB DATE Jul 86
NOTE 6p.
AVAILABLE FROM Association of College Unions-International, 400 E. Seventh Street, Bloomington, IN 47405 ($2.00).
PUB TYPE Information Analyses (070) -- Journal Articles (080)
JOURNAL CIT Bulletin of the Association of College Unions-International; v54 n3 p4-8 Jul 1986

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Civil Liberties; *College Administration; Constitutional Law; Contracts; *Court Litigation; Criminal Law; Guidelines; Higher Education; *Laws; *Legal Responsibility; Private Colleges; Public Colleges; *Student Personnel Services; *Student Unions; Torts
IDENTIFIERS *Negligence

ABSTRACT

Issues concerning legal liability for college student unions are examined, and guidelines are presented to reduce the risk of liability claims exposure for both the individual and the institution. General information is provided on: tort liability, civil rights liability, criminal liability, and contractual liability. In determining the potential for liability claims, a critical question is whether the individual was acting within the scope of professional responsibilities. The authority to act in the name of the institution rests on the legal foundation of the college or university. Differences for public and private institutions are also considered. Guidelines include: knowing one's authority to act, understanding institutional policies and rules, following the rules, reviewing written materials, informing individuals of risks associated with participation in activities sponsored by the union, assessing facilities and activities in terms of potential negligence claims, checking equipment, acting reasonably, becoming informed on current developments in the law, promoting legal awareness among the staff, and seeking legal advice. Court cases and references are cited. (SW)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED273204

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☐ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

ACU-I

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Legal Liability:

When is the union responsible?

Margaret J. Barr

It is 6:30 on a cold and icy morning, and the maintenance crew has just started clearing the front steps of the college union building. The chairperson of an off-campus group holding a conference in the facility arrives early, falls on the steps, and fractures a leg. Are you liable for the injury? Is your institution liable? If the injury occurred at 11 a.m. that same day, would your answer be any different?

The director of the health service calls to inform you that the health center has seen 20 students with symptoms of food poisoning. Their preliminary investigation indicates that the source of contamination appears to be the food preparation area of the union cafeteria. One student eventually becomes so ill that hospitalization is required, and the student must leave school. The student files suit against you, the food service director, and the institution asking for damages. Should you be concerned?

A new staff member gives a student permission to use a university vehicle without checking to see if institutional policy allows such use. It does not! Subsequently, the vehicle driven by the student is involved in an accident resulting in multiple injuries to others. Who, if anybody, should assume liability under such circumstances?

Members of an off-campus religious group request permission to collect money in the snack bar. No group is allowed to solicit in university facilities. You deny their request and they threaten legal action indicating you personally are violating their constitutional rights. What do you think is the possibility of a successful suit for damages on their part?

A student signs up for a trip to Florida sponsored by the union board. The advertisement says the price covers "all" expenses. She leaves for the trip and finds out that meals are not included in the trip price. Her parents send her money and then call you threatening legal action for violating your contract with their daughter. They end the conversation by saying they intend to hold you personally liable for the extra expenses their daughter has incurred. Should you worry?

These scenarios, although fictitious, are a reality for many college union personnel. In the United States today, individuals and groups are increasingly using the courts to settle differences and disputes. Colleges and universities have not been immune from this trend (Van Alystene, 1968). For college union personnel, the increase in court challenges to decisions and actions poses particular problems.

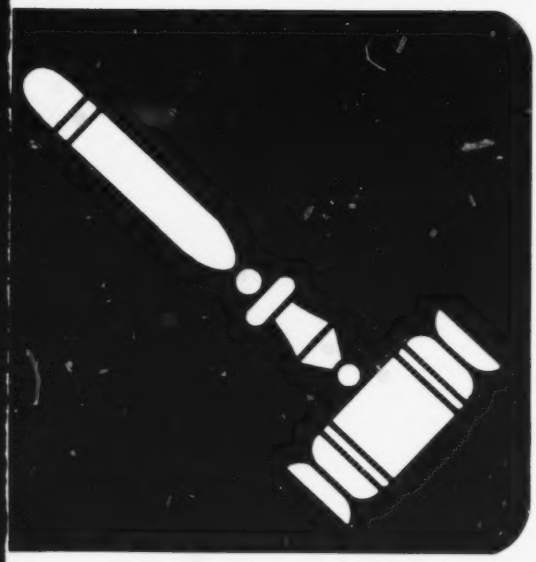
A good college union is a busy, active place. At any one time people in the building are eating, attending lectures or meetings, dancing, using the game room, buying books and supplies, or working. During a typical day, thousands of individuals use the college union facilities and services.

A good college union, however, is more than a building. Unions often sponsor trips, programs, and activities that do not occur within the structure. Unions also involve students in program development, policy development, and program implementation.

Staff members working within a college union setting carry a wide range of responsibilities. Each area of professional concern—whether it involves the use or scheduling of the union facility, a specific activity, a program, or supervision of staff or students—also carries with it a legal risk. The risk arises primarily because of the competing rights of individual users or participants and the legitimate rights of the institution. "When such controversies arise, the existence of legal responsibility or liability for the decision or action must be established" (Owens, 1984, p.8). Wise college union professionals must therefore know the legal ramifications of their work and effectively use that knowledge to avoid legal entanglements.

A word of caution is appropriate at this point. Although college union personnel should be concerned about numerous legal issues, this article does not cover all areas. Focusing primarily on liability, this

HE 019 618



article provides suggestions on how to reduce liability exposure for both the individual and the institution. The article is not a legal treatise on the subject of liability, but rather a compendium of general information on the subject. Finally, you should seek the advice of an attorney concerning specific legal questions. The specific rules and regulations of the institution, the facts surrounding the situation, and other circumstances can influence the liability risk of any action you may choose to take.

Definition of liability

The concept of liability is fairly broad in legal terminology. "Generally, it means responsibility for possible or actual loss, penalty, evil, expense or burden. Liability is often used to mean liability for damages, an amount determined by a trial of the facts of the case" (Barr, 1983, p. 88). Translated from the legal jargon, to be found liable is to be responsible, usually in a monetary sense, for an action or decision that causes harm or deprivation of the rights of another individual. There are several types of liability of concern to professionals: tort liability for both the institution and/or the individual professional, criminal liability, and contract liability.

Tort liability

"A tort is broadly defined as a civil wrong, other than a breach of contract, for which the courts will allow a damage remedy" (Kaplin, 1978, p. 55). An institution or an individual may incur tort liability. The wrongful act litigated in a tort liability case "may be against a person, a person's property, or a person's reputation, character or memory," and the wrongful act may be either intentional or unintentional (Owens, 1984, p. 9). When tort liability is found, the liability claim can be against either the institution or the individual whose act or failure to act harmed another. Two types of tort liability cases involving colleges and universities have frequently been litigated: negligence and defamation. Negligence is covered in this article because it should be of prime concern to college union personnel. Readers are referred to the reference list for information on defamation issues.

Negligence. In determining the liability responsibility of an institution or individual, the courts have focused on the legal relationship between the person or persons bringing the action and the institution. The distinction of invitees, licensees, and trespassers is important in understanding this legal relationship. An invitee is a person who is on the property because he or she "has been invited either expressly or by implication by the owner or possessor of the property" (Flora, 1970, p. I-59). Court decisions have supported the concept that the institution owes the duty of ordinary and reasonable care for invitees (*Brown* v. *Oakland*, 1942; *Leahy* v. *State*, 1944; *Sandoval* v. *Board of Regents*, 1965; and *Poulin* v. *Colby College*, 1979).

A licensee is on the property for his or her own convenience, but at the sufferance of the property owner (Flora, 1970, p. I-59). For licensees, the institution owes the duty of maintaining the property in a reasonably safe condition; however, if ordinary hazards exist and the licensee is injured, the institution has not been held liable (*Mortiboys* v. *St. Michaels College*). "Under conditions where a person assumes the risk of injury and injury occurs, courts have upheld liability claims against institutions or their agents" (*Rubtchinsky* v. *State University of New York*, 1965; *Dudley* v. *William Penn College*, 1974) (Barr, 1983, p. 47). These decisions are particularly important for college union personnel who often act as the institutional agent in leasing property to individuals or organizations. If the institution, through its agents, knew of a dangerous condition but allowed persons to lease or use the property and injury results, liability could be assessed.

Trespassers are on the property at their own risk without permission of the owners. This does not mean the owner is immune from suit if injury occurs to a trespasser. It does mean that the owner's legal responsibility to the individual is diminished.

In general, liability for negligence has been found when the injured party has proved that "(1) the institution or individual owed the injured party a duty of care, (2) there was a lack or breach of care, (3) an injury was suffered, and that the injury was a direct result of the lack of care" (Hollander, 1984, p. 46).

Civil rights liability

Section 1983 of the Civil Rights Act provides that an individual or institution may be held liable in cases involving constitutional rights. In 1980, the United States Supreme Court held that a municipality could not assert good faith as a defense against civil rights liability (*Owen* v. *City of Independence, Missouri*, 1980). Two additional Supreme Court cases (*Scheur* v. *Rhodes*, 1974; and *Wood* v. *Strickland*, 1975) have provided a foundation for determining the extent of personal liability of school officials under Section 1983 (Barr, 1983, p. 48). Both cases limit immunity from suit to persons acting in a governmental capacity. In *Wood (supra)*, both a subjective and an objective test for liability are set. Did school officials act without malice? And did they know, or should they reasonably have known, that their actions would violate a constitutionally protected right?

In addition to Section 1983, other federal statutes have potential for liability action through claims of discrimination. Title VI of the Civil Rights Act of 1965, Title IX of the Educational Amendments Act of 1972, and Section 504 of the Rehabilitation Act of 1973 all have liability potential. The courts have held that Title VI and Section 504 authorize an individual to

bring private legal suit to seek redress for alleged discrimination (*Cort v. Ash*, 1975; *Lau v. Nichols*, 1974). When such private litigation can be brought, the institution or the individual may be found liable, if the suit is successful, for award of reasonable attorney fees (Civil Rights Attorneys' Fees Award Act of 1976).

Criminal liability

Instances of criminal liability in colleges and universities have been rare, and case law in this area has been fairly limited. Criminal liability can occur when one has committed a crime or knows that a crime has been committed and conceals that information. Owens (1984) offers good advice when she writes, "Remember that no person can legally delegate an illegal act and to accept such a delegation is extremely unwise" (p. 8). It is in everyone's best interest to know the law and to not violate it or encourage others to do so.

Contractual liability

Contractual liability occurs when a contract between an individual and the institution is violated. The concept of a contractual obligation between a student and an institution is certainly not new (*Niedermeyer v. Curators of University of Missouri*, 1895). In the last decade, however, the number of court cases involving alleged contractual violations involving students has dramatically increased. "Virtually every oral and written contract between the student and the institution becomes a contractual obligation" (Shur, 1983, p. 27). To determine if a contract has been violated, the courts have relied on what promises were made to whom, under what conditions, and by what authority. Young indicates that "the elements of a contract are present by virtue of: (1) an offer by the University for students to attend and partake of its curriculum and services; (2) an acceptance by the student of that offer; and (3) consideration (money) tendered by the student" (Young, 1984, p. 16).

The concept of a contractual relationship between a student and an institution has changed since the court held in *Niedermeyer (supra)* that a contract of enrollment continued through the entire course of study at the institution. "Instead the courts have adopted what appears to be a more reasonable rule that the school has the right to make changes, with appropriate notice from time to time, in such areas as tuition" (Shur, 1983, p. 34).

In addition to their contractual relationships with students, college union personnel need to be particularly aware of other contractual obligations they routinely incur on behalf of the institution. Staff members sign contracts with film companies, entertainers, and service providers. It is essential for college union personnel to understand the implications of those contracts and the obligations attached to them for both the institution and the professional staff member. Moreover, professionals should clearly understand the role and scope of their authority within their professional responsibilities and act only within those parameters.

"The question of personal, professional, and institutional liability is complex, confusing, and often frightening for the practitioner."

Liability: Personal or institutional

A critical question in determining the potential for liability claims is whether the individual was acting within the scope of his or her professional responsibilities. Within the legal system, "trustees, officers and administrators of postsecondary institutions—public or private—can take only those actions and make only those decisions which they have the authority to take or make. Acting or deciding without authority to do so can have legal consequences both for the responsible individual and for the institution" (Kaplin, 1978, p. 37).

The authority to act in the name of the institution rests on the legal foundation of the college or university. For public institutions, authority to act is generally derived from the state statutes creating the institution, or in the case of the few states with constitutionally autonomous state universities, directly from the state constitution. In the case of private institutions, authority to act is normally derived from the institution's charter, articles of incorporation, a state license, or a combination of these sources.

The issue of authority is complicated and must be interpreted against the backdrop of other state statutes, administrative law, and institutional practice and tradition. The courts have supported the concept of explicit authority to act based on the source of the institution's legal foundation and the context in which they operate (*Splawn v. Woodard*, 1926). The courts have upheld the implied powers of an institutional governing board and its agents to act and make decisions (*Arizona Board of Regents v. Harper*, 1972; *Turkovich v. Board of Trustees University of Illinois*, 1957).

Claims of inherent powers of governing boards and their agents to act have not, however, received clear judicial support. The courts have

supported inherent powers to act in Texas (*Morris* v. *Nocotny*, 1959) and in New York (*Schuyler* v. *State University of New York at Albany*, 1968). On the other hand, courts in other jurisdictions have not supported such claims, holding that the concept of inherent powers on the part of institutions provides too great a degree of discretionary authority for action (*Lieberman* v. *Marshall*, 1970; *Estelan* v. *Central Missouri State College*, 1969; *Smith* v. *Ellington*, 1971).

College union personnel need to understand the range, scope, and limitations of their authority to act in a given situation. The legal basis for the action taken by an individual often determines whether the institution is potentially liable for the action or if the individual may be personally liable for the action (or inaction).

Owens poses three questions which every professional should ask when making any major decision or action: "(1) By what authority do I take this action or make this decision? (2) Is there any existing educational law that prohibits me from taking a considered action or making a considered decision? (3) In the absence of a required or prohibited position on this matter, what should I decide to do in this situation?" (Owens, 1984, p. 5). This set of questions assists in defining the issue of whether an individual is acting within the scope and responsibility of his or her official position within the institution. Acting outside the official scope and responsibility of an administrative position has the potential to make an individual personally accountable and thus liable for his or her act or decision.

Public and private institutions: The difference

Many issues separate public and private institutions in the realm of legal affairs. Funding, control, and the influence of the federal constitution on actions of the institution all provide distinctions. The differences become less distinct in the area of liability questions.

Many administrators in public institutions think the concept of sovereign immunity protects them from personal liability. That may be a false belief. The 11th Amendment is often cited as a defense against liability in public institutions. However, the 11th Amendment provides immunity only from suit in federal courts and further provides that liability judgments must be paid from state treasuries (Aiken, 1976, p. 131). Public institutions are also vulnerable to liability claims under the 14th Amendment. The courts have made a key distinction between institutional actions that are state actions and those that are proprietary in nature (*Carroll* v. *Kittle*, 1969). Finally, many states have also provided some form of limited waiver of sovereign or governmental immunity in tort liability cases. "Under such limited waivers of immunity, claims of liability are judged under the interpretation of the duty of the institution to the plaintiff" (Barr, 1983, p. 47).

The 14th Amendment is not usually binding in private institutions. The key question regarding the 14th Amendment for staff members working in private institutions is whether the private institution was engaged in state action. The doctrine of state action is difficult to prove unless "it can be shown that the private institution is so entwined with the state that the state action concept would apply" (Young, 1984, p. 17).

In both private and public institutions, however, liability can be assessed when state statutes are violated, or when a contract is abrogated, or when an issue of tort liability such as negligence is at question. Potential liability in such situations exists for both the individual and the private or public institution.

Guidelines

The question of personal, professional, and institutional liability is complex, confusing, and often frightening for the practitioner. No professional intentionally wants to harm or place at risk the institution that employs him or her. The following guidelines are presented for practitioners to review in the context of their daily work.

1. Know your authority to act. It is necessary for college union professionals to understand clearly the range and scope of authority associated with their positions. Seek clarification if there is any doubt about your authority to act under a given set of circumstances.
2. Understand institutional policies and rules. A thorough understanding of all applicable institutional policies, rules, and regulations is a necessary prerequisite to reduce potential liability claims. Again, seek clarification if needed.
3. Follow the rules. The risk of liability is diminished if professionals consistently enforce and apply regulations. Lack of consistency is a breeding ground for claims of arbitrary and capricious behavior and thus lays the foundation for liability claims. Discrimination claims are bound to arise when consistency is not the norm.
4. Carefully review all written materials. Any pamphlet, flier, brochure, or manual has the potential to be considered a contract involving the institution. A simple rule is: "Don't promise more than you can deliver." Provide appropriate disclaimers as needed. An annual review of all written materials is good practice.
5. Inform participants. Participants should be routinely informed of the risks associated with participation in any activity sponsored by the college union or student activities. Then, if people voluntarily choose to participate after being informed of the risks, liability claims of negligence are less potent if someone is injured. Some institutions use liability waivers as part of institutional publications. Bredemeier (1984) cautions that liability waivers should be used only when all participants may not know of potential danger.
6. Think negligence. Routinely audit all facilities and activities with an eye to potential negligence claims. Often professional, support, and other staff members accept situations that could be corrected if creativity and awareness were applied to the problem. A critical review of facilities on a regular basis can often prevent problems and thus subsequent claims.

7. Check equipment. Develop a schedule of routine maintenance and checks on all equipment. This will help avoid potential negligence claims because such a schedule shows that the institution exercised due care.
8. Act reasonably. A standard often used in determining liability claims is that of the "reasonable man." In other words, before you act, think of what a reasonable person would do under this set of circumstances, with this information, at this time and place.
9. Become informed. The law influencing higher education is continuing to grow in size and complexity. The astute college union professional should become informed and keep current on developments in the law.
10. Promote the legal awareness of staff. Most individuals in college union work are not, by virtue of preparation and background, well-versed in legal questions. As society becomes increasingly litigious, supervisors should assure that all staff are aware of and given counsel on the legal risks associated with their positions.
11. Seek legal advice. Sound legal advice is essential during policy development and policy implementation. Effective legal consultation can reduce the potential for liability claims. Engaging in preventive problem solving with an attorney is one of the most effective strategies you can use in reducing liability.

Several scenarios were presented at the beginning of this article. At this point, the reader should have gained at least enough information to respond to these questions. Reducing the risk of liability claims is in the best tradition of good college union management and programming practice and permits you to engage in your prime professional role in a more effective manner.

References

Aiken, R.J. Legal liabilities in higher education: Their scope and management. *Journal of College and University Law*, 1976, *3*.

Barr, M.J. *Student affairs and the law*. New Directions for Student Services Monograph Series, 22. San Francisco: Jossey-Bass, 1983.

Bredemeier, R. Risk management in campus activities programming. In H.F. Owens (Ed.), *Risk management and the student affairs professional*. NASPA Monograph Series, 2. Columbus, Ohio: National Association of Student Personnel Administrators, 1984.

Flora, C.A. Tort liability and insurance. In A. Knowles (Ed.), *Handbook of college and university administration*. New York: McGraw-Hill, 1970.

Hollander, P.A. The chief student affairs officer as employer and manager: A special risk. In H. F. Owens (Ed.), *Risk management and the student affairs professional*. NASPA Monograph Series, 2. Columbus, Ohio: National Association of Student Personnel Administrators, 1984.

Kaplin, W.A. *The law of higher education: Legal implications of administrative decision making*. San Francisco: Jossey-Bass, 1978.

Owens, H.F. Risk management and professional responsibility. In H.F. Owens (Ed.), *Risk management and the student affairs professional*. NASPA Monograph Series, 2. Columbus, Ohio: National Association of Student Personnel Administrators, 1984.

Shur, G.M. Contractual relationships. In M.J. Barr (Ed.), *Student affairs and the law*. New Directions for Student Services Monograph Series, 22. San Francisco: Jossey-Bass, 1983.

Van Alystene, W.A. The demise of the right—Privilege distinction in constitutional law. *Harvard Law Review*, 1968, *81*, 1439–1464.

Young, D.P. The student institutional relationship. A legal update. In H. Owens (Ed.), *Risk management and the student affairs professional*. NASPA Monograph Series, 2. Columbus, Ohio: National Association of Student Personnel Administrators, 1984.

Cases

Arizona Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972).

Brown v. Oakland, 51 Cal. App. 2d 150, 124 P.2d 369 (1942).

Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969).

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975).

Dudley v. William Penn College, 219 N.W.2d 484 (Iowa 1974).

Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Circ. 1969).

Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974).

Leahy v. State, 46 N.Y.S.2d 310 (Ct. of Claims 1944).

Lieberman v. Marshall, 236 So.2d 120 (Fla. 1970).

Morris v. Nowotny, 323 S.W.2d 301 (Tex. Civ. App. 1959); cert. den. 361 U.S. 889, 80 S.Ct. 164 (1959).

Mortiboys v. St. Michaels College, 478 F.2d 196 (2d Cir. 1973).

Niedermeyer v. Curators of University of Missouri, 1895.

Owen v. City of Independence, Missouri, 455 U.S. 662, 100 S.Ct. 1398 (1980).

Poulin v. Colby College, 402 A.2d 846 (Me. 1979).

Rubtchinsky v. State University of New York, 46 Misc.2d 679, 260 N.Y.S.2d 256 (Ct. of Claims 1965).

Sandoval v. Board of Regents, 75 N.M. 261, 403 P.2d 699 (1965).

Scheur v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683 (1974).

Schuyler v. State University of New York at Albany, 31 A.D.2d 273, 297 N.Y.S.2d 368 (1968).

Smith v. Ellington, 344 F. Supp. 90 (E.D. Tenn. 1971).

Splawn v. Woodard, 287 S.W. 677 (Tex. Civ. App. 1926).

Turkovich v. Board of Trustees University of Illinois, 11 Ill. 2d 460, 143 N.E. 2d 229 (1957).

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975).

Margaret J. Barr is vice chancellor for student affairs at Texas Christian University. She received her Ph.D. from The University of Texas at Austin, her master's from Southern Illinois–Carbondale, and her bachelor's degree from the State University of New York College at Buffalo. She serves as editor in chief of the Jossey-Bass New Directions for Student Services monograph series. Barr has more than 25 publications including the monograph Student Affairs and the Law. She is a former president of the American College Personnel Association.